

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION AT CLEVELAND

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IN RE: : Case No. 1:17-md-2804
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: November 17, 2021
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: November 18, 2021
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: November 19, 2021
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: November 22, 2021
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: November 23, 2021
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TRANSCRIPT OF JURY TRIAL PROCEEDINGS

HELD BEFORE THE HONORABLE DAN AARON POLSTER

SENIOR UNITED STATES DISTRICT JUDGE

Official Court Reporter: Heather K. Newman, RMR, CRR
United States District Court
801 West Superior Avenue
Court Reporters 7-189
Cleveland, Ohio 44113
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Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

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I N D E X

	<u>PAGE</u>
WEDNESDAY, NOVEMBER 17, 2021	7354
THURSDAY, NOVEMBER 18, 2021	7356
FRIDAY, NOVEMBER 19, 2021	7357
MONDAY, NOVEMBER 22, 2021	7359
TUESDAY, NOVEMBER 23, 2021	7365
VERDICT OF THE JURY	7365
CERTIFICATE	7371

1 WEDNESDAY, NOVEMBER 17, 2021, AT 4:51 P.M.

2 COURTROOM DEPUTY: All rise.

3 (Jury returned to courtroom at 4:54 p.m.)

4 THE COURT: Please be seated, ladies and

16:54:10 5 gentlemen.

6 I understand you wish to retire for the evening. Just
7 want to again give you my general admonitions.

8 Do not read, encounter, view, listen to anything
9 whatsoever about this case in any form of media.

16:54:25 10 Do not read, encounter, listen to anything on any
11 subject matter remotely resembling this case, and of course
12 don't discuss it -- the case with anyone else.

13 What time do you want to resume tomorrow morning?

14 THE JURY: 9:00 a.m.

16:54:42 15 THE COURT: 9 o'clock.

16 Okay. Have a good evening. Travel safely, and we'll
17 see you in the morning.

18 (Jury excused from courtroom at 4:54 p.m.)

19 THE COURT: I guess the jury advised Mr. Pitts
16:55:18 20 that they plan to have a 9:00 a.m. to 5:00 p.m. schedule.

21 Okay. Have a good evening, everyone.

22 (Proceedings adjourned at 4:56 p.m.)

23

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16:56:47 25

1 THURSDAY, NOVEMBER 18, 2021, AT 4:53 P.M.

2 (Jury returned to courtroom at 4:53 p.m.)

3 COURTROOM DEPUTY: All rise.

4 THE COURT: Okay. Good evening. Please be
16:54:26 5 seated.

6 So, ladies and gentlemen, I understand you want to
7 break for the evening. That's fine.

8 Usual admonitions. Don't read, listen, encounter
9 anything about this case in any form of media or anything
16:54:40 10 close to the subject matter of this case.

11 Don't discuss this case with anyone.

12 I assume you wish to reconvene at 9:00 a.m. tomorrow
13 morning?

14 THE JURY: Yes.

16:54:49 15 THE COURT: Okay. Drive safely.

16 We're expecting a little winter weather, so just make
17 sure -- don't start deliberating until all 12 of you are
18 there.

19 Have a good evening. Drive safely.

16:55:00 20 (Jury excused from courtroom at 4:55 p.m.)

21 THE COURT: Okay. Have a good evening,
22 everyone.

23 (Proceedings adjourned at 4:55 p.m.)

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16:55:25 25

1 FRIDAY, NOVEMBER 19, 2021, AT 1:43 P.M.

2 (Jury returned to courtroom at 1:43 p.m.)

3 THE COURT: Okay. Please be seated, ladies
4 and gentlemen.

13:43:34 5 I understand one of the jurors is not feeling well and
6 you want to break early. I hope he or she feels a lot
7 better.

8 So I assume you want to come back 9:00 a.m. Monday?

9 THE JURY: Yes.

13:43:46 10 THE COURT: Okay. Have a very good and safe
11 weekend.

12 Usual admonitions, particularly since you're going to
13 be off for a few days: Do not read, listen, encounter
14 anything whatsoever about this case in any sort of media or
13:44:00 15 anything remotely close to the subject matter of the case.

16 Of course, don't discuss this with anyone because
17 you're not with your fellow jurors. Someone tries to talk
18 to you about it, lay it on me and say you may not talk about
19 it until it's over.

13:44:15 20 Have a good weekend.

21 I see one gentleman is wearing his Browns shirt. You
22 know, the problem with the Browns, they're not as focused as
23 you are. You're on it every day. They're sort of -- some
24 days they're on and some days they're off, so we hope
13:44:29 25 they're on it on Sunday. So have a good weekend and see you

1 Monday.

2 THE JURY: Thank you.

3 (Jury excused from courtroom at 1:44 p.m.)

4 THE COURT: All right. Have a good weekend,

13:45:06 5 everyone.

6 (Proceedings adjourned at 1:45 p.m.)

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1 MONDAY, NOVEMBER 22, 2021, AT 4:39 P.M.

2 COURTROOM DEPUTY: All rise.

3 THE COURT: Before the jury comes in, in the
4 event we need a Phase II, I've looked at my calendar and I'm
16:40:35 5 proposing either the weeks of April 11th and 18th or May 9th
6 and 16th. And if we do the first one, I wouldn't have trial
7 Friday, the 19th, or Monday the -- I think Monday the 18th
8 or -- 18th, because that's Good Friday and Passover and
9 Easter. I figure we could get it done in about eight days.
16:41:06 10 So if you all want to look at your calendars, if you have a
11 strong preference for one or the other, let me know, but
12 those are the two times I could do it, and I'd rather know
13 because I'm starting to set a whole bunch of criminal trials
14 that have been obviously backed up and I need to -- need to
16:41:27 15 schedule them.

16 MR. GALLUCCI: I'm sorry, Your Honor, what
17 were the May dates that you mentioned?

18 THE COURT: Let's see, Frank, the 9th -- the
19 weeks of the 9th and 16th. Those two weeks.

16:41:42 20 MR. GALLUCCI: Thank you.

21 THE COURT: I'm thinking we're probably going
22 to need about eight days -- eight, nine days, somewhere in
23 there.

24 MR. LANIER: Your Honor, maybe inappropriate
16:41:52 25 to ask but just for planning, are we going to let the jury

1 deliberate on Christmas?

2 (Jury returned to courtroom at 4:42 p.m.)

3 THE COURT: Okay. Please be seated, ladies
4 and gentlemen.

16:42:16 5 I'm glad the juror who was not feeling well last week
6 is better, and the Browns managed to prevail, although they
7 were hardly as focused as you were.

8 So I understand you want to recess for the evening.
9 Usual admonitions.

16:42:32 10 Do not read, listen, encounter anything whatsoever
11 about this case in any form of media or anything close to
12 the subject of this case.

13 Don't discuss it with anyone.

14 I assume you plan to reconvene at 9:00 a.m. tomorrow
16:42:47 15 morning?

16 THE JURY: Yes.

17 THE COURT: Okay. Safe travels, and have a
18 good evening.

19 THE JURY: You too.

16:42:56 20 (Jury excused from courtroom at 4:42 p.m.)

21 MR. STOFFELMAYR: If it's okay, could we just
22 discuss the schedule for the rest of the week?

23 THE COURT: Sure. Just close the door if you
24 would, please.

16:43:30 25 Yeah. Everyone can be seated.

1 THE jury sets their own schedule, otherwise -- other
2 than I've told them Court's closed Thursday and Friday, so
3 there will be no -- if they're still deliberating, they're
4 off Thursday and Friday. Wednesday, you know, they said I
16:43:46 5 set -- you know, they set their own schedule, Kaspar, so,
6 you know, I don't tell them when to come in and I don't tell
7 them when to leave.

8 My guess is if they're still deliberating Wednesday
9 and they haven't reached a verdict, they'll want to knock
16:43:59 10 off early, which is fine with me. But I never -- other than
11 days when court is closed, like Friday, which is -- court is
12 closed, I tell them that. But on days when court's open,
13 I'm -- my practice has been to let the jury set their own
14 hours. I mean, if they want to stay late one night, they
16:44:20 15 can stay late. I didn't -- I don't tell them to go home at
16 quarter to 5:00. On the hand, when they want to go home,
17 I -- if I don't let them, that would be improper, so ...

18 MR. STOFFELMAYR: All right. Thank you.

19 I just wanted to make sure ...

16:44:33 20 THE COURT: So I --

21 MR. LANIER: The court is closed on Friday. I
22 didn't know that was a for sure.

23 THE COURT: Oh. Oh, I'm sorry. Yeah,
24 we're -- and I -- and we've conveyed that to the jury, that
16:44:47 25 court is closed Friday. It's a -- court is closed. Yeah.

1 MR. LANIER: Good.

2 THE COURT: So they're not going to be
3 deliberating Friday. Obviously not deliberating Thursday
4 either, so ... but if, you know, they don't reach a verdict
16:45:01 5 Wednesday and whenever they want to recess, they'll be back
6 Monday morning and I -- if and when -- if and when
7 Judge Gwin wants his -- needs his courtroom for a trial, I
8 will have -- I will relocate the jury to the 15th floor
9 courtroom which we've set aside as the media room which we
16:45:26 10 can have for another couple weeks. We don't need -- you
11 know, there's no media needed. Because I actually have a
12 criminal trial set for the Tuesday after Thanksgiving. So
13 if it -- that's happening, I'll need all of you to
14 congregate maybe on the 7th floor, whatever, because I'll
16:45:45 15 actually have a criminal trial. It's a definite go.

16 MR. LANIER: Is it a juicy one?

17 THE COURT: A juicy one?

18 MR. LANIER: One we'd want to watch?

19 THE COURT: You can watch. This is a -- this
16:45:59 20 defendant is accused of getting into a -- getting into a
21 physical altercation with some VA officials who were, you
22 know, trying to arrest him for something. So it's not --
23 fortunately, no one was seriously hurt but there was an
24 altercation so he's accused of threats and impeding officers
16:46:20 25 in their official business and he wants a trial, so he'll

1 get a fair trial. You can all watch.

2 MR. SWANSON: What happens if you get a
3 question from the jury when you're trying a case?

4 THE COURT: It will be interesting.

16:46:39 5 I mean, I'll obviously have to put -- what I'll
6 probably do -- what I'll probably do is have everyone go
7 into the room where the jury is with the court reporter and
8 do it there rather than -- you know, and obviously take a
9 break here and have -- put this jury in the jury room while
16:46:58 10 I do it.

11 MR. STOFFELMAYR: What happens if you get
12 questions from both juries at --

13 THE COURT: At once. Yeah.

14 (Simultaneous crosstalk)

16:47:06 15 THE COURT: Then I'll get one of my
16 colleagues. Then I'll -- I don't know what I'll do. Yeah,
17 I -- I don't know. I've thought of it, but I'll -- whatever
18 happens, happens, you know. I'll multitask, like all of you
19 guys and women multitask too, so if I need to do it ...

16:47:27 20 I think once I had a jury deliberating when I had
21 another trial, so, I mean, it's not -- that happens. You
22 know, a lot of trials, so ...

23 And this trial was scheduled well over a year ago. It
24 was postponed a couple times because of COVID, so finally
16:47:43 25 we're able to do it, so ...

1 Okay. Have a good evening, everyone.

2 (Proceedings adjourned at 4:47 p.m.)

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1 TUESDAY, NOVEMBER 23, 2021, AT 1:30 P.M.

2 (Jury returned to courtroom with its verdict and the
3 following proceedings occurred at 1:31 p.m.):

4 THE COURT: Good afternoon, ladies and
13:31:44 5 gentlemen.

6 Please be seated.

7 I understand the jury has reached a verdict; is that
8 correct?

9 JUROR NO. 11: That is correct.

13:31:50 10 THE COURT: All right. If the foreperson
11 could give Mr. Pitts the verdict forms, please.

12 Thank you.

13 (Brief pause in proceedings)

14 VERDICTS OF THE JURY

13:32:30 15 THE COURT: Okay. As to Lake County, the jury
16 has found unanimously that Lake County proved by a greater
17 weight of the evidence that the oversupply and diversion is
18 a public nuisance.

19 And the jury found unanimously that Lake County proved
13:32:55 20 the public nuisance against CVS, against Walgreens, and
21 against Walmart.

22 All forms are signed and dated.

23 As for Trumbull County, the jury unanimously found
24 that Trumbull County proved by the greater weight of the
13:33:17 25 evidence a public nuisance in Trumbull County.

1 And the jury unanimously found by the greater weight
2 of the evidence that CVS was a substantial factor, that
3 Walgreens was a substantial factor, and that Walmart was a
4 substantial factor.

13:33:40 5 Do counsel want to look at the verdict forms?

6 Mr. Pitts, show those to people.

7 MR. LANIER: Plaintiffs have no need,
8 Your Honor.

9 THE COURT: Well ...

13:33:50 10 (Brief pause in proceedings)

11 MR. STOFFELMAYR: Thank you.

12 MR. DELINSKY: Thank you, Judge.

13 THE COURT: Okay. All right.

14 Ladies and gentlemen, you have the Court's thanks and
13:34:18 15 the thanks of all the lawyers and all the parties. You
16 were -- as I think I said, in my 45 years as a lawyer and as
17 a judge, you were the most diligent jury that I've ever
18 seen.

19 This is a very complex case. You were paying
13:34:36 20 attention every moment. You asked very profound questions,
21 and you deliberated for five or six days before reaching a
22 verdict going through everything. So you have our thanks.
23 I hope you have a greater appreciation of our system of
24 justice as a result of your service.

13:34:55 25 So you're now discharged. You are now free to talk

1 about the case with anyone or not talk to. You're free, and
2 you're free to watch or listen to anything you want. And I
3 know it's been an imposition for having not -- not able to
4 do that for now almost two months. So I have juror
13:35:16 5 certificates for each of you.

6 It's also my practice to invite any juror who wants to
7 to come back into my chambers and see what the inside of a
8 judge's office looks like, talk to me. I always ask jurors
9 if there's anything we could have done to make your life
13:35:35 10 easier, other than paying you more. That's set by
11 Congress -- Congress sets that. I can't override Congress,
12 but certain things obviously we try to do. Or if you have
13 any questions about what was going on or what I do or
14 whatever.

13:35:54 15 And I'm sure that the lawyers would like an
16 opportunity to talk to you. That's perfectly -- that's
17 completely optional. As it is to talk to me. If you just
18 want to say, I'm out of here, that's fine. We can mail you
19 your certificate. But if anyone who wants to meet with me,
13:36:13 20 Mr. Pitts will bring you back into my chambers and then I'm
21 sure the lawyers will stick around and if anyone wants to
22 come out and meet with the lawyers and you can ask them
23 anything, they can ask you anything. It might be helpful to
24 them.

13:36:28 25 Okay. So thanks to all of you.

1 (Jury excused from courtroom at 1:36 p.m.)

2 THE COURT: All right. Everyone can be
3 seated, please.

4 All right. Well, again, this case was very well tried
13:37:17 5 by all sides and jury deliberated very long. So everyone
6 gave them a lot to think about.

7 So I don't know if you have conferred among yourselves
8 if you collectively prefer the April date or the May date.
9 If there's a consensus, I'll obviously go with the
13:37:40 10 consensus. If there's a split decision, I'll have to
11 decide.

12 MR. WEINBERGER: We have not conferred,
13 Your Honor, but we're satisfied with the April dates.

14 MR. STOFFELMAYR: I think we need a chance
13:37:53 15 to --

16 THE COURT: All right. Why don't you confer
17 and if you can get back -- if you can get back to me no
18 later than tomorrow, I would appreciate it because I'm
19 scheduling a bunch of things and all of you will schedule a
13:38:03 20 bunch of things.

21 Again, I don't -- it doesn't really matter to me.
22 It's a month apart. So we just need to know.

23 And then I think you should submit a schedule, work on
24 a schedule. Whatever date you pick, a schedule.

13:38:23 25 I'm hoping there aren't going to be *Daubert* motions,

1 but ... I mean, if there are, I'll have to -- I guess you'll
2 need to build that in. I mean, that's -- I mean, there are
3 obviously experts on both sides. The defendants have seen
4 the plaintiffs' experts, so -- but you can get that. I
13:38:43 5 guess I would like to have a schedule ... well, I'd like to
6 know whether we're April or May by noon tomorrow. And I'd
7 like a schedule ... seems to me a week is sufficient for a
8 schedule. Everyone's got Thanksgiving. So why don't we
9 just say -- I'll just say noon, next Wednesday, the 1st, for
13:39:07 10 a joint schedule. By noon tomorrow whether it will be April
11 or May.

12 And, again, the April days, we were not going to have
13 court on Good Friday and the following Monday.

14 Okay. Anything else anyone wants to bring up?

13:39:35 15 I will start talking to the jurors and then I'll
16 encourage them to come out but, of course, I can't make --
17 and they -- I don't know if anyone will even want to meet
18 with me.

19 MR. LANIER: We would like to meet with them,
13:39:48 20 Your Honor.

21 MR. DELINSKY: We would too, Your Honor.

22 THE COURT: No, I understand that, so I will
23 encourage them to come out and meet with you.

24 MR. STOFFELMAYR: Thank you.

13:39:56 25 THE COURT: But again, I can't make -- I can't

1 make them.

2 MR. WEINBERGER: Your Honor, before you leave
3 the bench, if I could -- if I can have sort of the senior
4 prerogative here, as the oldest person in the room and as
13:40:08 5 the Clevelander, on behalf of our clients and on behalf of
6 our team, I just wanted to reiterate to you personally the
7 amazing job that you did on this case. The way in which you
8 handled adversity and adverse positions on behalf of all the
9 defendants and us in this case, and your judicial
13:40:44 10 temperament, we just want to express our gratitude and
11 thanks for the hard work you did.

12 MR. LANIER: Hardest working judge I've ever
13 been in front of in 37 years.

14 THE COURT: That's very high praise,
13:40:53 15 Mr. Lanier, because I know you've been in front of a lot of
16 judges, state and federal.

17 Thank you, Mr. Weinberger.

18 All right. Well, again, this -- you know, I had the
19 best lawyers in the country. I said that publicly and
13:41:06 20 privately. You fought hard. That's the way good lawyers
21 should be. I tried to stay relatively even with my rulings.
22 No one liked all the rulings, so ...

23 And in terms of my temperament, it's my job to try and
24 stay calm, whether I feel it or not. Litigation is a
13:41:24 25 full-contact sport. I was a litigator, so, again, I would

1 expect good lawyers to fight very hard for their clients'
2 positions, and all of you did that.

3 So thank you, have a very good Thanksgiving.

4 (Proceedings adjourned at 1:41 p.m.)
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8 **C E R T I F I C A T E**

9 I certify that the foregoing is a correct transcript
10 of the record of proceedings in the above-entitled matter
prepared from my stenotype notes.

11 /s/ Heather K. Newman 11-23-2021
12 HEATHER K. NEWMAN, RMR, CRR DATE
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